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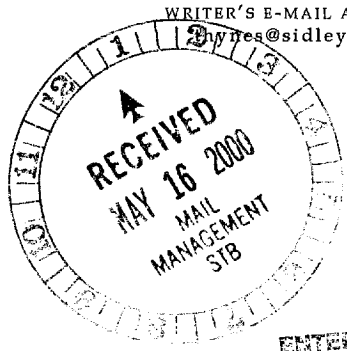
May 16, 2000



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Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 582 (Sub No. 1); Major Rail Consolidation Procedures

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of Canadian Pacific Railway Company's Comments (CPR-2). Also enclosed is a computer disk containing a copy of this submission in WordPerfect format.

Please date-stamp the two (2) extra copies of the enclosed filing and return them via our messenger.

Sincerely,

Terence M. Hynes

Enclosures

cc: All Parties of Record

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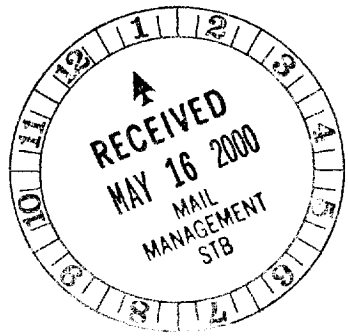
CPR-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (Sub. No.1)

MAJOR RAIL CONSOLIDATION PROCEDURES



COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY

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DATED: May 16, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY

Pursuant to Board's March 31, 2000 Decision in the above-captioned proceeding (the *"Rulemaking Order"*), Canadian Pacific Railway Company and its wholly-owned subsidiaries, Soo Line Railroad Company ("Soo"), Delaware and Hudson Railway Company, Inc. ("DHRC"), and St. Lawrence and Hudson Railway Company Limited ("St.L&H") (collectively "CPR") submit these initial comments concerning possible modifications to the STB's Railroad Consolidation Procedures (49 C.F.R. §§ 1180.0-1180.9).

CPR is a Class I carrier that operates a 14,400-mile rail network serving all of the principal business centers of Canada, as well as 16 states in the U.S. Northeast and Midwest. Through its Soo and DHRC subsidiaries, CPR operates nearly 5,000 miles of rail lines in the United States. CPR interchanges traffic directly with all of the major Class I railroads. CPR's network includes eight border gateways that offer a wider range of routings for north-south traffic than any other railroad in North America. Shipments moving to, from or between points in the United States accounted for more than half of the CPR system's total rail traffic in 1999.

CPR is the only major Class I carrier that has not participated in a major merger or consolidation transaction during recent years. The last consolidation in which CPR was an applicant was its acquisition of DHRC in 1991.[1] Since that time, CPR has focused its efforts on integrating DHRC into the CPR system, investing in physical plant, modernizing the CPR locomotive fleet, and deploying improved information systems. More recently, CPR has been exploring potential strategic partnerships with U.S. railroads, in an effort to improve service offerings for cross-border traffic.

CPR agrees that it is appropriate for the STB to reevaluate its merger regulations to take account of fundamental changes that have occurred over the past two decades in the structure of the North American rail industry and the business environment in which railroads and their customers operate. In light of the service disruptions that have arisen in implementing recent mergers, the Board should require future applicants to submit a "Merger Implementation Plan" describing in detail the manner in which they propose to implement the transaction, and to develop contingency plans to address potential service failures during the implementation process. The STB should also formalize in its regulations the recent practice of conducting post-merger oversight of approved transactions to assure that service is not compromised and that the public benefits promised by the applicants are being realized.

CPR does not believe that the STB should fundamentally alter its approach to competitive issues in rail merger proceedings. The Board's current policies strike an appropriate balance between regulatory intervention and reliance upon market forces. A policy under which

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[1] *See* Finance Docket No. 31700, *Canadian Pacific Limited—Purchase and Trackage Rights—Delaware & Hudson Ry. Co.*, 7 I.C.C.2d 95 (1990).

the Board routinely exercised its conditioning authority to increase (rather than preserve) the post-merger competitive options available to shippers would undermine the efforts of merged carriers to achieve the traffic density necessary for profitability and to attract the capital required to meet the future needs of the shipping public.

The Board's consolidation regulations should recognize the reality of a "North American" rail system that includes the Canadian and Mexican railroads, as well as those located within the United States. Thus, it would be appropriate to require the proponents of a cross-border transaction to identify in their application the anticipated changes in traffic and operating patterns across the entire merged system (including changes that may occur on lines outside the United States). However, the STB's regulations should neither prohibit nor discourage the acquisition of control of a U.S. Class I carrier by a Canadian railroad, nor should they discriminate in any manner against non-U.S. applicants.

I. GENERAL POLICY STATEMENT.

The STB's current General Policy Statement regarding rail consolidations (49 C.F.R. § 1180.1) was promulgated in 1982. At that time, the rail industry was suffering from a number of problems, including excess capacity, deteriorating physical plant and burdensome regulation, that threatened the industry's survival. In order to address these circumstances, the ICC adopted a merger policy that affirmatively encouraged consolidations as a means of rationalizing the rail system, so long as competition was not substantially reduced. The STB (and ICC before it) imposed conditions on mergers to the extent necessary to preserve pre-merger levels of competition in affected markets.

For the most part, this policy has been successful. The North American rail system now consists of seven Class I carriers, with regional and shortline carriers providing service to local markets.[2] The major rail carriers of today are stronger and more efficient than their predecessors, and provide single-line service over broader geographic areas. The most recent round of rail consolidations has produced a balanced competitive structure, with two major Class I systems serving each of the Eastern United States, Western United States and Canada. However, as the size and scope of merger transactions has grown, carriers have experienced difficulties in implementing those transactions, resulting in short-term, but costly, service failures.

As it enters the new millennium, the rail industry faces different challenges than it did in the 1980's. North American industries compete in an increasingly global economy, and shippers require the ability to transport freight efficiently worldwide. On the North American continent, NAFTA and its predecessor, the U.S. -Canada Free Trade Agreement, have generated double-digit annual increases in trade among the United States, Canada and Mexico, with a corresponding rise in demand for north-south rail transportation. In order to be competitive in world markets, North American firms have adopted "just-in-time" delivery and other advanced logistics practices to streamline their operations. The explosion of "e-business" is creating even greater opportunities for North American shippers in an increasingly fast-paced global marketplace.

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[2] The class exemption for line sales to short-line carriers (49 C.F.R. §§ 1150.31-1150.34) promulgated by the ICC in 1985 provided an opportunity for Class I carriers to shed unprofitable lines, while preserving rail service that might otherwise have been lost through abandonment. Short-line and regional carriers are an integral part of today's North American rail network.

These rapid changes create new challenges for the rail industry. First and foremost among those challenges is to develop a total network capable of delivering reliable, on-time service on a consistent basis. In order to do so, railroads must improve operations in terminal areas, and create additional capacity to handle future growth in rail traffic. They must deploy improved information systems to support their operations, and find new ways to reduce their costs (in order to compete successfully for modal-competitive traffic). In addition, carriers must respond to the needs of their customers with new supply chain and logistics services that make rail more attractive than alternative modes of transportation.

Notwithstanding the greater geographic reach of today's Class I carriers, the North American rail system remains an interdependent network. Further coordination among the remaining Class I carriers will be needed to accomplish these critical objectives. The geographic balance resulting from the last round of rail mergers, and the corresponding reduction in the number of major industry players, provide an opportunity for Class I railroads to pursue strategic partnerships or similar cooperative ventures to achieve synergies in areas such as administration, procurement and equipment sharing. Such arrangements might also provide a vehicle for terminal improvement projects, investments in technology solutions, and the development of new e-business applications that enhance the quality of rail service and open new markets to carriers and shippers. Strategic marketing alliances hold the potential for extending the commercial reach of individual rail carriers without resort to a formal merger.

The STB should promote an environment that encourages carriers to innovate in this manner. In order for such cooperative ventures to be successful, participating carriers may be required to make substantial joint investments, to establish new jointly-owned entities, or even

to exchange equity in existing companies. Uncertainty regarding potential regulatory obstacles to such ventures will create a strong disincentive for carriers to pursue them. Indeed, the prospect that such arrangements might be delayed by extended regulatory scrutiny, or even disallowed after a large investment of time and resources has occurred, may lead carriers to forsake creative forms of cooperation and pursue formal mergers instead. The STB should consider measures to reduce regulatory barriers to innovative strategic initiatives. In particular, the Board should articulate a policy that looks favorably upon creative strategic partnerships among connecting carriers. In addition, the Board should promulgate a regulation that provides a process under which carriers can obtain, on an expedited (and, to the degree permissible under the Board's governing statute, confidential) determination as to whether such transactions require regulatory approval under the carrier control or pooling provisions of the ICCTA.

Another means by which railroads might pursue such synergies is through further consolidation. In the *Rulemaking Order*, the STB raises the question whether the public interest might best be served if the remaining Class I carriers pursue these benefits exclusively through strategic alliances or similar initiatives rather than via merger. *Rulemaking Order* at 3, 4. CPR believes that rail carriers should have the freedom to pursue efficiencies and to develop new service offerings either through the merger process or pursuant to contractual arrangements short of merger. What may be best for carriers in one set of circumstances may not work for carriers facing different circumstances. Accordingly, the STB should not adopt any policy that disfavors further consolidation, or that requires Class I carriers to pursue strategic alliances as a prerequisite to seeking authorization for a formal merger. Rather, the Board should continue its

case-by-case approach to rail mergers, and approve those transactions that can be shown, on balance, to be consistent with the public interest.

II. DOWNSTREAM EFFECTS.

The *Rulemaking Order* indicates that the STB "definitely intend[s] to propose" elimination of the so-called "one case at a time" rule set forth at 49 C.F.R. § 1180.1(g). Under its current regulations, the STB has declined to consider in a pending merger proceeding the potential "cumulative impacts or crossover effects" of subsequent consolidation proposals.[3] The *Rulemaking Order* indicates that, under the proposed change, the STB would examine "the likely 'downstream' effects of a proposed transaction, including the likely strategic responses to that transaction by non-applicant railroads." *Rulemaking Order* at 6.

CPR supports such a change to the extent that it would enable the STB to consider in a pending merger proceeding the possible cumulative or crossover impacts of responsive consolidation transactions. However, CPR does not believe that it would be appropriate for the Board to render its decision on a merger application on the basis of speculation regarding hypothetical future transactions that might never occur. Rather, the Board should implement this change in two ways. First, in rendering its decision on a pending consolidation application, the Board should consider issues raised by interested parties regarding potential cumulative or crossover impacts of any responsive transactions that actually materialize during the course of the first proceeding. In appropriate circumstances, the Board might consolidate the proceedings

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[3] *E.g., Burlington Northern Inc., et al.—Control and Merger—Santa Fe Pacific Corp., et al.*, 10 I.C.C.2d 661, 772 (1995); *Union Pacific Corp., et al.—Control—Missouri-Kansas-Texas R.R. Co., et al.*, 4 I.C.C.2d 409, 519 (1988).

on both applications in order to facilitate such an analysis. Second, if an interested party raises a substantial issue concerning potential cumulative or crossover effects of a hypothetical responsive transaction between non-applicant carriers, the Board may elect to reserve jurisdiction, as part of its oversight of the first transaction, to consider such impacts if the second transaction actually occurs.[4] Applicants in the first proceeding would be on notice that, if adverse cumulative impacts were to arise as a result of the second transaction, the STB might decide to impose additional conditions on the first transaction to ameliorate such adverse effects. In this way, the Board can protect the public from potentially harmful cumulative impacts of multiple consolidation transactions without basing its decision in any case upon hypothesis or speculation.

III. RAIL SERVICE ISSUES.

The *Rulemaking Order* solicited comments as to how the STB's regulations might be modified to protect shippers from merger-related service disruptions and the loss of adequate infrastructure and capacity. *Rulemaking Order* at 7. The current regulations require the submission of an Operating Plan that summarizes proposed changes in the applicants' operations, the effect of such changes on traffic density, construction or rehabilitation projects required in

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[4] Adoption of this approach would not create an incentive for non-applicant carriers to delay announcement of a responsive merger. To the contrary, such a policy change would encourage those carriers to come forward with their responsive transaction at the earliest time, so that any necessary remedial conditions might be imposed in the first proceeding (rather than in the second, as is currently the practice). In any event, as the CEO's of several Class I railways testified at the March hearings, carriers simply cannot afford to delay competitive responses to a major consolidation involving their competitors. Testimony of Robert J. Ritchie, March 7, 2000, Transcript at 164, 213-214; Testimony of David R. Goode, *id.* at 195.

connection with the merger, and the benefits anticipated to result therefrom. 49 C.F.R. § 1180.8(a). However, those regulations do not require applicants to describe with specificity the steps that they propose to take to implement the merger, nor do they require applicants to have in place contingency plans to deal with possible service failures during implementation.

CPR believes that the Board should amend its regulations to require future merger applicants to present a detailed "Merger Implementation Plan." That plan should, at a minimum, address three implementation-related subjects. First, the plan should describe the specific manner (and timing) in which applicants propose to make changes in organization structure, train and terminal operations, and staffing levels, and detail the steps that applicants plan to take to integrate critical systems such as IT platforms and customer service. Second, the plan should identify those areas in which the most significant changes will occur, as well as the locations (e.g., busy terminal areas) at which the risk of temporary service disruption is greatest. For each such "hot spot" or significant planned operational change, the Applicants should be required to develop a contingency plan to deal with possible service failures.[5] Third, the plan should identify specific service criteria (e.g., average terminal dwell time, average train velocity, average number of cars on-line and/or average time from car order until car placement) through which the public and the Board would be able to gauge the level of service quality on applicants' lines both pre-merger and post-merger.

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[5] Merger implementation is a fluid process, and circumstances can arise that dictate a change from the original plan. The Board's regulations should not be drafted in such a way as to "straightjacket" the merging carriers or prevent them from modifying their implementation plan to meet the exigencies of day-to-day rail operations. Significant departures from the Merger Implementation Plan can be reported to the Board during the post-merger oversight process.

Given the differing geographic locations and operating circumstances likely to be presented by particular consolidation transactions, it may not be feasible for the Board to fashion a regulation that addresses each and every possible service issue that could arise in implementing a particular transaction, or metrics appropriate to measure service quality in all circumstances. The regulations should require the applicants, in the first instance, to identify the particular implementation issues and service measurements appropriate to their proposed transaction. Thereafter, interested parties (or the Board itself) should have an opportunity to identify additional implementation issues (or service measures) which applicants would be required to address in a subsequent filing.

In order to assure that merging carriers implement their transaction as promised, the STB should monitor closely the implementation process as part of its post-merger oversight.[6] During the oversight period, the merged carrier should be required to submit regular reports containing information and data sufficient to demonstrate that it is performing in accordance with the Operating Plan and Merger Implementation Plan filed as part of the application. If the merged carrier is experiencing service disruptions or other unanticipated problems in implementing the transaction, it should be required to submit evidence describing its efforts to resolve such problems and a timetable for achieving such resolution.

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[6] CPR suggests that the STB's current practice of imposing a five-year oversight condition in major consolidation cases be formally adopted as a regulation. Such oversight will afford the Board (and interested parties) an opportunity to address significant service and competitive issues that may arise post-consummation. It would also present a forum for the consideration of cumulative impacts or crossover effects generated by a subsequent merger transaction.

The Board should also invite applicants to offer, as part of the Merger Implementation Plan, voluntary remedies for service failures during the implementation process. The merger regulations should encourage applicants to offer specific, bona fide remedies for service disruptions resulting from the proposed transaction. The offer (and potential effectiveness) of such voluntary remedies should be considered by the Board in weighing the merits of future rail merger applications.

In the event of substantial service disruptions, the Board's existing regulations at 49 C.F.R. §§ 1146-1147 provide a procedure under which shippers may obtain temporary alternative rail service.[7] In light of the availability of that remedy, it is not necessary for the Board to adopt additional access regulations to address service issues in this rulemaking proceeding.

IV. COMPETITION ISSUES.

The Board has indicated that "we believe that the time has come to consider whether we should alter out rail merger policy to place a greater emphasis on enhancing, rather than simply preserving, competition." *Rulemaking Order* at 7. CPR does not believe that it would be in the public interest for the Board to alter fundamentally its approach to competitive issues in rail merger cases, for several reasons:

First, such competition enhancing conditions would not, by definition, be addressed to any particular competitive harm caused by the merger in which they were imposed. Rather, the Board would simply be using the occasion of a rail merger application to increase the

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[7] *See* Ex Parte No. 628, *Expedited Relief for Service Inadequacies* (served December 21, 1998).

level of competition in markets served by the merging carriers. The STB should resist the urging of shippers to use its merger oversight as a vehicle for effecting wholesale changes in the scheme of railroad regulation.[8]

Second, it would be extremely difficult for the STB to establish a workable standard for determining when such competition-enhancing conditions should be imposed and when they should be denied. Virtually any shipper might fashion a proposal to "enhance" its rail service options. Should the Board grant all such conditions, or only some? It is unclear what standards the Board might use to distinguish between those competitive situations worthy of regulatory intervention, and those of a more marginal nature.

Third, use of the merger process to provide relief to "captive" rail shippers (via mandatory switching or other forms of forced access) would favor those shippers who happened to be located on the lines of a carrier involved in a merger transaction, at the expense of competing shippers served by non-applicant carriers. Providing forced access on the basis of such happenstance would upset the dynamics of the markets in which shippers compete. Adoption of such a policy would seem particularly perverse in a regulatory environment in which the Board encouraged Class I carriers to consider alternatives to merger as a means of achieving efficiencies and service improvements. Shippers served by carriers who pursued strategic

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[8] As the ICC recognized, "[i]mposing conditions unrelated to a merger's impact, upon a transaction otherwise consistent with the public interest, would be at odds with the Congressional policy that privately-initiated transactions should be approved so long as they are consistent with the public interest." *Union Pacific Corp. et al. – Control – Missouri Pacific Corp. et al.*, 366 I.C.C. 459, 564 (1982); *see also Southern Pacific Transportation Co. v. Interstate Commerce Commission*, 736 F.2d 708, 722 (D.C. Cir. 1984) (the ICC has properly declined in merger cases "to act as a roving ombudsman restructuring railroads on its own in order to satisfy an individual carrier's notion of what effective competition may require").

partnerships could be placed at a competitive disadvantage vis-à-vis those served by carriers that chose formal merger.

Fourth, exercise of the Board's conditioning authority to enhance intramodal competition -- and, in particular, imposing conditions that opened up all exclusively-served shippers to alternative rail carriers -- would deprive the merging carriers of the traffic density and revenues needed to sustain profitable operations and to justify the investments necessary to meet the future needs of their customers. If the STB were to adopt a policy of routinely imposing such conditions as the "price" for approval in future merger cases, there may very well be no more major merger cases.

Of course, applicants would be free to offer, on a voluntary basis, conditions that enhance the competitive options of shippers served by the merger carrier. As with voluntary service remedies, the Board can take such competition-enhancing proposals into account in weighing the overall merits of the proposed merger.

CPR offers the following comments concerning the specific potential changes in the Board's treatment of competition issues identified in the *Rulemaking Order*:

A. Three-To-Two Markets.

Over the past 15 years, the ICC/STB has developed a bright-line rule requiring that trackage rights, haulage rights or similar relief be imposed to preserve competition for any shipper whose rail options would be reduced from two to one. At the same time, the Board has considered on a case-by-case basis (and in most instances has declined to impose) conditions for the benefit of shippers whose choices would be reduced from three to two. The *Rulemaking*

Order requests comments as to "whether and how our assessment of 'three-to-two' effects should be reflected in our new merger rules...." *Rulemaking Order* at 9.

CPR supports retention of the STB's case-by-case approach to evaluating "three-to-two" markets. The question whether the presence of two rail competitors adequately constrains the potential exercise of post-merger market power is a highly fact-specific inquiry. The STB should continue to examine the particular competitive circumstances affecting markets in which a proposed consolidation would reduce the number of rail competitors from three to two, and impose conditions where appropriate to assure vigorous post-merger competition in those markets.[9]

B. Open Gateways.

In *Traffic Protective Conditions*, 366 I.C.C. 112 (1982), the ICC abolished its prior practice of requiring merging carriers to maintain all pre-merger gateways. The ICC determined that the so-called "DT&I Conditions" tended to reduce railroad efficiency and, in some instances, were actually anticompetitive. The fundamental assumption underlying that decision was that a merged carrier would have sufficient economic incentive to utilize a more efficient joint line route rather than its own less efficient single line route. *Id.* at 123.

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[9] Given the current structure of the North American rail industry, there are far fewer locations today at which a merger of two major Class I carriers would reduce the number of competitors from three to two. As a result of the latest round of rail consolidations, most rail markets are currently served by two Class I carriers (and, in some instances, a short-line or regional carrier). A reduction in the number of competitors from three to two as a result of the acquisition of a short-line railroad by a Class I carrier would not appear to warrant the imposition of a condition to preserve a third option unless it were shown that the short-line occupied a unique competitive role that ought to be maintained.

Notwithstanding this basic shift in policy, the STB (and the ICC before it) have considered requests for gateway protection on a case-by-case basis, and have on occasion imposed conditions to preserve competitive routings where such conditions were shown to be necessary and appropriate.[10] The Board should retain flexibility to consider meritorious requests for gateway protection on a case-by-case basis. For example, if an east-west transcontinental merger threatened to result in the closure of a major Mississippi River gateway by the applicants, the STB could utilize its conditioning authority to prevent such an anticompetitive result. However, the Board should exercise its authority only where necessary to preserve efficient gateways over which significant traffic volumes moved pre-merger, and not to mandate a proliferation of inefficient or "paper" gateways.

C. Mandatory Switching.

The Board should reject any blanket proposal to require merging carriers in all instances to provide reciprocal switching arrangements to all exclusively served shippers in or adjacent to terminal areas, regardless of whether the proposed merger would otherwise cause a loss of competition at that location. Under the current law, shippers already have the means of obtaining competitive rail service via reciprocal switching where such service is warranted.

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[10] For example, in the recent CN/IC control proceeding, the STB granted a request by the State of North Dakota for a gateway protective condition (to which the Applicants acquiesced) requiring CN/IC to maintain an open and competitive gateway between Chicago and New Orleans for grain traffic originating in North Dakota. *Canadian National Ry. Co., et al.—Control Illinois Central Corp., et al.*, STB Finance Docket No. 33556 (served May 25, 1999) at 37-38.

In a merger proceeding, shippers can ask the Board to impose a switching condition at locations where reciprocal switching agreements existed prior to the merger or where competition would otherwise be substantially lessened, as the Board did in the recent *Conrail* proceeding. *CSX Corp., Norfolk Southern Corp. et al. Control and Operating Leases/Agreements Conrail Inc. et al.*, STB Finance Docket No. 33388 (served July 23, 1998) at 57. The imposition of a mandatory switching condition in that context is fully consistent with the Board's longstanding policy of preserving pre-merger competition.

Outside the merger process, shippers may seek access to a second rail carrier under the Board's competitive access standards where the serving railroad abuses market power or otherwise acts in an anticompetitive fashion. 49 C.F.R. § 1144.5. The existing competitive access standards reflect the statutory policies set by Congress for railroad access and switching agreements, and are designed to provide shippers "reasonable competitive access where needed" without unnecessarily compromising railroad revenue adequacy. *Intramodal Rail Competition*, 1 I.C.C.2d 822, 837 (1985).

To impose a universal competitive access condition on a rail merger, where there has been no showing that the merger would reduce the competitive options of shippers, would confer an advantage on shippers served by the merging carriers vis-à-vis firms with which those shippers compete that may be served by non-applicant carriers. There is no valid justification for fundamentally altering regulatory policy concerning competitive access on such an unprincipled basis.

D. Bottleneck Rates.

The Board's recent bottleneck cases, *Central Power & Light Co. v. Southern Pac. Transp. Co.*, STB Docket Nos. 41242, et al., (Dec. 31, 1996) ("*Bottleneck I*"), clarified (Apr. 30, 1997) ("*Bottleneck II*"), establish a framework for the Board to address competitive issues that arise at rail bottlenecks outside the merger context. In addition, CPR understands that certain U.S. Class I carriers may propose new regulations pursuant to which the Board would provide relief to shippers affected by a consolidation transaction in which a carrier operating the bottleneck segment of a joint-line route proposed to merge with one of the carriers operating the competitive portion of the joint route. In its June 5 reply submission, CPR will comment in greater detail on any such proposal presented in the opening submissions of other parties.

V. MEASURING PUBLIC INTEREST BENEFITS.

The *Rulemaking Order* solicits comments regarding the manner in which the STB should measure the public benefits associated with future rail consolidation proposals. *Rulemaking Order* at 9. Some parties have suggested that the Board should be "more critical and skeptical" of applicants' estimates of the synergies and other benefits likely to result from a proposed merger. *Id.* In response to the suggestion that certain types of benefits associated with end-to-end mergers can be realized through strategic alliances and other contractual arrangements short of formal merger, the *Rulemaking Order* poses the question whether the Board should adopt a policy under which such benefits would not be counted in weighing the merits of a proposed consolidation unless the applicants affirmatively demonstrate that such benefits cannot be achieved by means short of merger. *Id.*

CPR generally endorses an approach under which the STB would "raise the evidentiary bar" relating to the evaluation of public benefits. In past merger proceedings, the applicants' claimed public benefits have often been supported by little more than self-serving, conclusory rhetoric extolling the benefits of "single-line" service (or, in one recent proceeding, "single-line-like" service[11]). Likewise, applicants' calculation of the economic value of claimed public benefits have not been subjected to careful scrutiny in past cases. The STB should revise its regulations to require future applicants to describe the claimed benefits of their transaction in greater detail, and to support the measurement of those benefits with data sufficient to enable interested parties (and the Board) to critically evaluate both the likelihood and the magnitude of the public benefits flowing from the proposed transaction. Only such "demonstrable" benefits should be accorded weight by the STB in conducting its Section 11324 balancing test.

At the same time, CPR urges the STB to broaden its evaluation of merger benefits to take into account new categories of benefits likely to result from innovations in the way railroads conduct business in the "new economy." In addition to those "conventional" benefits associated with past mergers (e.g., new single-line service, improved equipment utilization, and reduced transit times), the Board should consider, and give appropriate weight to, benefits derived from enhanced business processes, new supply chain and logistics services and e-business applications offered by the merging carriers. In today's business environment, such innovations may be of equal or greater value to shippers than improvements in train service.

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[11] *Union Pacific Corp., et al.—Control—Chicago & North Western Holdings Corp., et al.*, I.C.C. Finance Docket No. 32133 (served March 7, 1995) at 13-14.

CPR does not believe that the STB should adopt a rule under which such benefits would be disregarded in weighing the merits of a proposed consolidation unless the applicants prove that those benefits could not be achieved by any means short of merger. Railroads (like other businesses) should have the freedom to make the strategic determination whether to pursue such benefits via formal merger or by partnering with unaffiliated carriers. The merits of each approach may differ in varying circumstances, depending upon such factors as the relative size and competitive positions of the involved carriers, the scope of proposed venture, the benefits sought to be achieved, the anticipated cost of achieving those benefits and the carriers' corporate cultures. What may be right for one railroad may not work for another. The STB should not adopt a policy that imposes a "one size fits all" approach to the pursuit of greater efficiency and commercial reach.

VI. LABOR ISSUES.

The National Railway Labor Conference ("NLRC") is submitting comments that address employee-related issues raised in the *Rulemaking Order*. CPR has reviewed the NLRC's submission and agrees generally with the positions set forth therein.

VII. CROSS-BORDER ISSUES.

During the March hearings, a number of parties expressed concern about supposed adverse consequences of a transaction in which a major U.S. railroad came under the control of a Canadian carrier. The *Rulemaking Order* seeks comments "as to whether and how these concerns should be addressed in our merger rules." *Rulemaking Order* at 11.

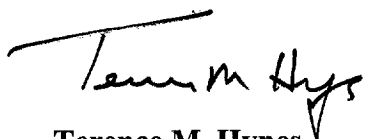
The "foreign" ownership issues raised at the March hearings provide no basis for adopting regulations under which the STB would disfavor, or prohibit, the acquisition of control of a United States rail carrier by a Canadian road. CPR has owned and operated rail lines in the United States for more than a century. Canadian National has likewise owned its Grand Trunk subsidiary for many decades. Both CPR and CN have complied with the laws of the United States in operating their respective U.S. properties. This experience, over more than 100 years of railroad history (including several periods of war), refutes the notion that either CPR or CN would flout U.S. law, or undermine national security, if they were to acquire additional U.S. rail properties. To the contrary, CPR and CN (like those U.S. railroads whose lines extend into Canada) observe all applicable laws on both sides of the border.

The increasing economic integration of the United States, Canada and Mexico, and the corresponding growth in cross-border freight traffic, have created a greater demand for a coordinated "North American" rail network. The Canadian railroads and their U.S. counterparts must cooperate (whether by formal merger or through strategic partnerships short of merger) to meet the present and future needs of the shipping public. The STB's regulations should not interfere with this process by prohibiting or discouraging transactions pursuant to which a Canadian carrier might obtain control of a U.S. railroad.

CPR understands that one or more U.S. railroads may propose modifications to the Board's regulations that would require the proponents of a cross-border consolidation transaction to include in their application the same information as would be required if the merging systems were both located entirely within the United States. In particular, they may propose that the Operating Plan and competitive impact analyses submitted in connection with

such applications include data and information regarding operating changes and competitive impacts on both sides of the border. In principle, CPR does not object to such a requirement, which is consistent with the reality of a "North American" rail network. CPR will comment on any specific proposal that may be presented in the initial comments of other parties in CPR's June 5 submission.

Respectfully submitted,



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DATED: May 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of May, 2000, I served the foregoing Comments of Canadian Pacific Railway Company by messenger or by postage prepaid, first class mail upon all parties of record shown on the service list by the Board on April 28, 2000, as supplemented.

Terence M. Hynes